

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CARLOS ORTIZ,	§	
	§	No. 336, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0208005710
Appellee.	§	

Submitted: July 26, 2010  
Decided: September 23, 2010

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

**ORDER**

This 23<sup>rd</sup> day of September 2010, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The appellant, Carlos Ortiz, filed this appeal from the Superior Court's May 25, 2010 denial of his third motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The appellee, State of Delaware, has filed a motion to affirm on the ground that it is manifest on the face of Ortiz' opening brief that the appeal is without merit.<sup>1</sup> We agree and affirm.

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<sup>1</sup> Del. Supr. Ct. R. 25(a).

(2) In May 2003, a Superior Court jury convicted Ortiz of two counts of first degree rape and numerous related offenses resulting from Ortiz' attack on his estranged wife, in the presence of the couple's three children. Ortiz' wife and children were among the witnesses at trial.

(3) On direct appeal, Ortiz raised one claim, *i.e.*, that the Superior Court erred when admitting evidence of his child's out-of-court statement to an investigating detective.<sup>2</sup> By Order dated January 15, 2004, we determined that Ortiz' claim was without merit and affirmed the judgment of the Superior Court.<sup>3</sup>

(4) In his first motion for postconviction relief filed in November 2005 and in a federal habeas corpus petition filed in August 2008, Ortiz repeated the claim that he had raised on direct appeal, *i.e.*, that the Superior Court erred when admitting his child's out-of-court statement. By order dated March 22, 2007, the Superior Court denied Ortiz' postconviction motion,<sup>4</sup> and this Court affirmed on appeal.<sup>5</sup> By memorandum opinion dated October 9, 2009, the District Court denied Ortiz' habeas petition as time-barred.<sup>6</sup>

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<sup>2</sup> Ortiz argued that the statement was involuntary. *See* Del. Code Ann. tit. 11, § 3507(a) (2007) (providing that "[i]n a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.").

<sup>3</sup> *Ortiz v. State*, 2004 WL 77860 (Del. Supr.).

<sup>4</sup> *State v. Ortiz*, 2007 WL 901639 (Del. Super.).

<sup>5</sup> *Ortiz v. State*, 2007 WL 4462942 (Del. Supr.).

<sup>6</sup> *Ortiz v. Phelps*, 2009 WL 3271362 (D. Del.).

(5) Approximately three weeks after his federal habeas petition was denied, Ortiz filed his second motion for postconviction relief in the Superior Court. In his second motion, Ortiz made a general allegation that “testimonial statements” had been admitted illegally at his trial in violation of the United States Supreme Court’s decision in *Crawford v. Washington*.<sup>7</sup> Because Ortiz did not specify the nature of the statements or whose statements they were, however, the Superior Court characterized the *Crawford* claim as conclusory and in an order dated December 18, 2009, denied Ortiz’ second postconviction motion as procedurally barred without exception.<sup>8</sup>

(6) In his opening brief on appeal from the denial of his second motion for postconviction relief, Ortiz continued to make a general allegation that testimonial statements had been admitted illegally at trial. In an exhibit to the brief, however, Ortiz appeared to narrow the claim, suggesting that the Superior Court erred when admitting an out-of-court tape-recorded statement made by his wife, the primary victim of his crimes, when she was interviewed by police. The Court declined to address Ortiz’ claim, as narrowed, because it was not presented

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<sup>7</sup> See *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that the admission at trial of a witness’ out-of-court testimonial statement violates the Confrontation Clause if the witness is unavailable to testify and the defendant had no prior opportunity for cross-examination).

<sup>8</sup> See Del. Super. Ct. Crim. R. 61(i) (listing procedural bars to postconviction relief).

to the Superior Court.<sup>9</sup> Moreover, when affirming the Superior Court's denial of relief, we determined that:

Even if viewed on the merits, Ortiz' claim is unavailing because the ruling in *Crawford* does not apply if the declarant is available for cross-examination at trial. In Ortiz' case, his wife testified at his trial and was available for cross-examination. As the United States Supreme Court held in *Crawford*, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."<sup>10</sup>

(7) Ortiz filed his third motion for postconviction relief on May 10, 2010.

In his third motion, Ortiz repeated the *Crawford* claim, as narrowed, *i.e.*, that the Superior Court erred when admitting an out-of-court tape-recorded statement made by his wife in an interview with police. By order dated May 25, 2010, the Superior Court denied Ortiz' third motion for postconviction relief on the basis that this Court had previously determined that the claim was without merit. This appeal followed.

(8) Having carefully considered the parties' positions on appeal, the Court concludes that the Superior Court appropriately denied Ortiz' third motion for postconviction relief. As we stated when affirming the denial of Ortiz' second motion for postconviction relief, Ortiz' wife testified at trial and was available for

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<sup>9</sup> *Ortiz v. State*, 2010 WL 925859 (Del. Supr.).

<sup>10</sup> *Id.* (citing *Miller v. State*, 893 A.2d 937, 953 (Del. 2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 59 (2004))).

cross-examination. Thus, the admission of her out-of-court statement is not inconsistent with *Crawford*.

(9) The Court notes that Ortiz appears to argue on appeal that the out-of-court tape-recorded statement of his wife was inadmissible because the recording included prejudicial third-party statements made by the interviewer. Ortiz, however, has provided no support for his conclusory claim that the recording included prejudicial third-party statements.<sup>11</sup> Therefore, we decline to consider that claim for the first time on appeal.<sup>12</sup>

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>11</sup> *Stevens v. State*, \_\_ A.2d \_\_, 2010 WL 2873802 (Del. July 22, 2010) (providing that “innocuous types of third party statements need not be redacted”).

<sup>12</sup> Del. Supr. Ct. R. 8; *Hardin v. State*, 844 A.2d 982, 984 (Del. 2004).